No. 93-657

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In The

Supreme Court of the United States

October Term, 1993

CITY OF CHICAGO,-

Petitioner,

vs.

MACEO G. WILLIS, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF HAWAII, ALABAMA, ILLINOIS, NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO, OKLAHOMA, SOUTH CAROLINA, VERMONT, AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORY OF AMERICAN SAMOA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The amici States, Territory, and Commonwealth, are vitally interested in this case, in which the United States Court of Appeals for the Seventh Circuit sharply restricted the discretion available to the States and their law enforcement officers in the period between a warrantless arrest and the neutral determination of probable cause required by this Court's decisions in *Gerstein v.*

Pugh, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

In the decision below, the Seventh Circuit interpreted language of this Court's decision in *County of Riverside* as forbidding the detention of a suspect, arrested on a police officer's on-the-scene assessment of probable cause, for less than forty-eight hours in order to assess and investigate evidence that the suspect had committed other crimes, and thus was a candidate for higher bail. The State of Illinois, like twenty-two other States, sets the bail determination at the suspect's initial appearance before a magistrate. Twenty-two additional States direct by state statute, rule, or practice, that the bail proceeding occur *before* the suspect's initial appearance. *See* Pet. at 13-14 & n.7. Therefore, if the ruling of the Seventh Circuit is allowed to stand and proliferate, the conduct of police throughout the Nation will be affected in numerous ways that are not, we submit, mandated by this Court.

The amici States believe that the Seventh Circuit has fundamentally misunderstood *County of Riverside*. Like the Ninth Circuit, whose decision to the contrary in *Kanekoa v. City and County of Honolulu*, 879 F.2d 607 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 2055 (1991), was allowed to stand despite the ruling in *County of Riverside*, every other Circuit to have ruled on the effect of *County of Riverside*, *see United States v. Adekunle*, 2 F.3d 559 (5th Cir. 1993); *United States v. Salmanca*, 990 F.2d 629, 633 (D.C. Cir. 1993), as well as the Supreme Court of California, *People v. Clark*, 833 P.2d 561 (Cal. 1992), *cert. denied*, 113 S. Ct. 1604 (1993), the amici States submit that if there is, in fact, probable cause at the outset of a detention, such matters

as "completing paperwork, searching the suspect, inventorying property, fingerprinting, photographing, checking for prior record, laboratory testing, interrogating the suspect, verifying alibis, ascertaining similarities to other related crimes, and conducting line-ups" "may be proper administrative steps incident to an arrest in a given case." *Sanders v. City of Houston*, 543 F. Supp. 694, 700 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984).

County of Riverside simply does not stand for the viewpoint accepted by the Seventh Circuit in this case. While this Court stated that a delay in presentment beyond forty-eight hours may violate the Fourth Amendment "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably," and that "unreasonable delay" would include "delays for the purpose of gathering additional evidence to justify the arrest," 111 S. Ct. at 1670, this statement does not proscribe the vast array of "administrative steps" routinely deployed by federal, state, and local police officers to "inform the police of the suspect's identity, residence, competence, and whether it is safe to release the suspect pending further proceedings," as well as whether "the case is no longer worth pursuing," *Kanekoa*, 879 F.2d at 611. Because the Seventh Circuit's decision in this case portends a sea change in the constitutional constraints on police conduct, and creates a wide split in the circuits and with the highest courts of the States, the writ should issue.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit, Notwithstanding the Consistent View of Other Courts of Appeals and the Highest Courts of the States to the Contrary, Has Wrongly Expanded the Proscriptive Effect of *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), on Pre-Presentment Police Activities.

1. In directing that judgment be entered against the City of Chicago on the basis of the 45-hour delay in Maceo Willis's presentment to a magistrate, the Seventh Circuit relied on a single phrase from this Court's opinion in *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991): "Examples of unreasonable delay [within the first forty eight hours of a warrantless arrest] are delays for the purpose of gathering additional evidence to justify the arrest. . . . " 111 S.Ct. at 1670. The Seventh Circuit interpreted this phrase as barring the Chicago police from detaining Maceo Willis on aggravated sexual assault charges arising from Chicago police "Area 3" while the police assessed whether Willis should be subject to a high bail, in light of the possibility that Willis was behind other aggravated sexual assaults in "Area 2." *See* Pet. App. 8a-10a. This assessment of the pendency of other charges against Willis is directly contrary to the Ninth Circuit's conclusion in *Kanekoa v. City and County of Honolulu*, 879 F.2d 607 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 2055 (1991), that pre-presentment delay is legitimate under *Gerstein* if for the purposes of determining "whether it is safe to release the suspect pending further proceedings." *Id.* at 607. In fact, the Seventh Circuit's conclusion that *County of Riverside* "clearly prohibit[s]" further review of the evidence pertaining to the crime

charged (Pet. App. 8a) is also directly at odds with *Kanekoa*, where suspects were detained and interviewed as late as nineteen hours after their arrests on serious felony charges, and where this Court denied *certiorari* after *County of Riverside* was handed down. Had *County of Riverside* been even "sufficiently analogous" so as "to compel re-examination" of *Kanekoa*, this Court plainly would have vacated the judgment in *Kanekoa*, and remanded to the Ninth Circuit for further proceedings in light of *County of Riverside*. *See Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964).

2. In addition to conflicting with this Court's own specific treatment of the impact of *County of Riverside*, the Seventh Circuit's decision is at odds with every single court of appeals to have ruled upon the "gathering additional evidence" proscription, as well as with the ruling of the Supreme Court of California on the same question. *See United States v. Adekunle*, 2 F.3d 559 (5th Cir. 1993) (detention of over 100 hours appropriate to determine if suspect is alimentary canal smuggler); *United States v. Salamanca*, 990 F.2d 629, 633 (D.C. Cir. 1993) (24 hour delay in which statement was taken from suspect held not unreasonable); *United States v. Perez-Bustamante*, 963 F.2d 48, 53-54 (5th Cir. 1992) (five day delay over a holiday "not acceptable as standard operating procedure," but delay in case is not sufficient to render confession illegal since "there is no evidence" that the interrogation was "lengthy, hostile, or coercive" and suspect "volunteered" to talk); *People v. Clark*, 833 P.2d 561, 603 (Cal. 1992) (upholding post-arrest confession within *County of Riverside's* presumptively valid forty-eight hour period), *cert. denied*, 113 S. Ct. 1604 (1993).

3. The issue resolved by the Seventh Circuit adversely to the City of Chicago is one truly of nationwide significance, and merits this Court's immediate attention. This is so, independent of the conflicts the *Willis* decision engenders. Although *County of Riverside* attempted to provide "sufficient guidance" to channel *Gerstein's* mandate that "probable cause determinations be 'prompt,' " as the *Willis* case demonstrates, *County of Riverside's* language itself has been misinterpreted, or at a very minimum, amenable to a variety of interpretations that lead to widely varying results. Properly interpreted, we submit, as it has been in the Fifth, Ninth, and District of Columbia Circuits, as well as the Supreme Court of California, *County of Riverside* does not bar the taking of additional statements from witnesses, interviews of the suspect, line-ups, photographic show-ups, or a host of routine police procedures, at least within the first forty-eight hours, *if* the arrest is otherwise "justified." *See* 111 S. Ct. at 1670. Such routine administrative steps are part of police practice in virtually every State. Indeed, taken to its logical conclusion, the Seventh Circuit's decision in the *Willis* case makes the federal Government's elaborate statutory procedure for assessing the admissibility of pre-presentment confessions, *i.e.*, 18 U.S.C. § 3501, entirely superfluous. The Seventh Circuit's decision rejects this Court's decades-old refusal to apply the *McNabb-Mallory* supervisory power, or the substantive requirements of 18 U.S.C. § 3501, to the States. *Cf. McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). Above all, it abandons the flexibility both *Gerstein* and *County of Riverside* establish as the hallmark of Fourth Amendment analysis in this setting.

4. The Seventh Circuit's decision deeply cuts into the States' efforts to combine probable cause hearings with bail determinations. *See* Pet. at 13 & n.7. Such a combination of hearings often works to the *benefit* of suspects. Although the probable cause showing is a minimal one, *see Illinois v. Gates*, 462 U.S. 213, 235 (1983), the State has an enormous interest in keeping flight risks or dangers to the community either off the streets entirely *pendent lite*, or, at least, subject to a sufficiently high bail to guarantee their presence at trial and their appropriate conduct pending their trial. The bail determination is often sufficiently complex that it warrants further investigation of the suspect's background than is necessary in the context of the mere determination of probable cause. The evidence garnered in this investigative process is often relevant to probable cause to believe the crime charged has been committed, but the *purpose* of the bail investigation is not coterminous with investigating for "additional evidence to justify the arrest." *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *County of Riverside*, on this fundamental policy level, simply has no negative implications for Chicago's actions here. If *Willis* is permitted to stand, State efforts to combine bail and probable cause hearings will be significantly distorted, to the potential detriment of many suspects who would gain nothing from an early *Gerstein* hearing, but much from an early bail hearing. If the former cannot be held coterminously with the latter, States have little incentive to provide the earliest possible bail hearing. As the Second Circuit has correctly observed, "the constitutional 'promptness' of a probable-cause hearing must be determined in light of the totality of the process afforded the

defendant." *Williams v. Ward*, 845 F.2d 374, 386 (2nd Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989).

5. The Seventh Circuit's decision also intrusively frustrates the States' ability to formulate their post-arrest procedures in a way that encourages a wise use of prosecutory discretion. In *Kanekoa v. City and County, supra*, suspect interviews allowed local police to simply dismiss the charges on the ground that a compelling case for *conviction* could not be made, even though there was ample probable cause for the arrest. As an experienced trial judge in New York City has written:

> [A] decision invalidating pre-arraignment interviews by prosecutors on . . . constitutional grounds . . . would deal a serious blow to the prosecution of violent crimes by local law enforcement. It is a common practice in local law enforcement, especially as to serious crimes of violence such as murders, rapes and armed robberies, for assistant district attorneys to question arrested suspects prior to arraignment and appointment of counsel. This is, in my view, a desirable practice which helps appraise the quality of the evidence before a prosecutorial decision is made and obtains valuable evidence of the most serious offenses, while giving assurance that the rights of arrested suspects have been respected in the questioning.

United States v. Rondon, 614 F. Supp. 667, 675 (S.D.N.Y. 1985).

6. In this latter vein, even if the Seventh Circuit's construction of *County of Riverside* has merit for misdemeanor arrestees, where bail considerations are less pressing, and where an inference of "delay for delay's

sake" can more easily be drawn from an extended pre-presentment detention, there is no basis for the Seventh Circuit's strict reading of the Fourth Amendment in the context of felony arrestees such as Maceo Willis. As this Court has observed with respect to such arrestees, "[t]he law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." *United States v. Hensley*, 469 U.S. 221 (1985), *quoted in, Doulin v. City of Chicago*, 662 F. Supp. 318, 335 (N.D. Ill. 1986). This case does not present the instance in which detention was ordered for a "minor misdemeanor," leaving the inference that the "disability is imposed for the purpose of punishment," and not "incident of some other legitimate governmental purpose." *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1350 (7th Cir. 1985). Although the Seventh Circuit's earlier decisions seemed to leave open the possibility of varying standards for felony arrestees, the *Willis* panel has exacerbated the conflicts in the appellate courts by reading *County of Riverside* as barring flexibility even in this most serious of contexts. For this and all the preceding reasons, certiorari should be granted.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the Petition for Certiorari.

Respectfully submitted, November 29, 1993.

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